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No. 93-643

IN THE
Supreme Court of the United States
OCTOBER TERM, 1993

BESSEMER & LAKE ERIE RAILROAD COMPANY,
Petitioner,

v.

REPUBLIC STEEL CORPORATION, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE AND BRIEF FOR THE BUSINESS ROUNDTABLE AS AMICUS CURIAE IN SUPPORT OF PETITIONER

Of Counsel
RICHARD REA
Barley Mill Plaza
P.O. Box 80036
Wilmington, DE 19880-0036

* Counsel of Record

November 24, 1993

THOMAS B. LEARY *
MICHELE S. HARRINGTON
HOGAN & HARTSON
555 Thirteenth Street, N.W.
Washington, D.C. 20004
(202) 637-5662
Counsel for Amicus Curiae The Business Roundtable

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The Business Roundtable respectfully moves for leave to file the attached brief as *amicus curiae* in this case. The consent of the attorney for petitioners has been obtained. Although the attorneys for respondents were contacted in advance of filing deadlines for the attached brief, some of the attorneys for some of the respondents (such as Republic Steel Corporation, Jones & Laughlin Steel Incorporated and Wheeling-Pittsburgh Steel Corporation) at this point have not consented to the filing of the attached brief.

The Business Roundtable is an association of about 200 member companies represented by their chief executive officers. These companies, widely dispersed by type of business and geographic location, are substantial producers and consumers of goods and services. They believe it is critical that the marketplace operate competitively.

Accordingly, they have a vital interest in antitrust law interpretation and enforcement, including the continued viability of the rules announced in *Hanover Shoe Inc.* v. *United Shoe Machinery Corp.*, 392 U.S. 481 (1968) and *Illinois Brick Co.* v. *Illinois*, 431 U.S. 720 (1977), which bar claims by either plaintiffs or defendants that antitrust damages have been passed on. Members of The Business Roundtable have been both antitrust defendants and antitrust direct purchaser plaintiffs, and share the concerns that this Court expressed in *Hanover Shoe* and *Illinois Brick* about manageability and fairness in antitrust litigation.

In this case the court below decided that *Associated General Contractors, Inc.* v. *California State Council of Carpenters*, 459 U.S. 519 (1983), had modified the prohibition against litigation of pass on issues. The attached brief demonstrates that *Associated General Contractors* did not modify the *Illinois Brick* (and *Hanover Shoe*) rule, and also that the lower court's own modification of the rule violates important and compelling policy considerations. Accordingly, if permitted to stand, the Third Circuit's decision could unleash all the evils which the *Illinois Brick* court attempted to contain—the risk of multiple liabilities for defendants, unduly complex and unmanageable antitrust litigation, and reduced incentive for antitrust enforcement by private parties.

For the foregoing reasons, The Business Roundtable requests that the attached brief in support of the petition for a writ of certiorari be accepted for filing.

Respectfully submitted,

Of Counsel
RICHARD REA
Barley Mill Plaza
P.O. Box 80036
Wilmington, DE 19880-0036

* Counsel of Record

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THOMAS B. LEARY *
MICHELE S. HARRINGTON
HOGAN & HARTSON
555 Thirteenth Street, N.W.
Washington, D.C. 20004
(202) 637-5662
Counsel for Amicus Curiae
The Business Roundtable

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BRIEF FOR THE BUSINESS ROUNDTABLE AS AMICUS CURIAE IN SUPPORT OF PETITIONER

INTEREST OF AMICUS CURIAE AND SUMMARY OF ARGUMENT

The Business Roundtable is an association of about 200 member companies represented by their chief executive officers. These companies, widely dispersed by type of business and geographic location, are both substantial producers and consumers of goods and services. They have a direct interest in the standards, established by this Court in the *Illinois Brick* [1] case, that promote an efficient, manageable and fair resolution of antitrust disputes. They are concerned about the process, not only as potential de-

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[1] *Illinois Brick Co.* v. *Illinois*, 431 U.S. 720 (1977).

fendants, but also as potential plaintiffs with substantial claims as direct purchasers.[2]

Because the parties are represented by eminent counsel, and because it is likely that other briefs *amici* will be filed, The Business Roundtable will not burden this Court with a repetitious recitation of the relevant facts or with arguments that merely restate those made elsewhere. Instead, The Business Roundtable will simply focus on the reasons why this Court should overturn the Third Circuit's unilateral modification of *Illinois Brick*. This brief will show, first, that the Third Circuit was wrong to assume that *Associated General Contractors, Inc.* v. *California State Council of Carpenters*, 459 U.S. 519 (1983), substituted a balancing test for the clear-cut, bright-line rule enunciated in *Illinois Brick*. The *Illinois Brick* decision, which bars litigation based on the claim that antitrust damages have been passed on, was in turn based on the compelling policy concerns outlined in *Hanover Shoe*[3] twenty-five years ago. This Court has never retreated from either decision. Second, this brief will show that the public policy considerations that drove the *Illinois Brick* and *Hanover Shoe* decisions are as valid and compelling today as they were when those cases were decided, and that the Third Circuit's decision undercuts these policy considerations.

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[2] Petitioner has consented to the filing of this brief and its original letter of consent is filed herewith.

[3] *Hanover Shoe, Inc.* v. *United Shoe Machinery Corp.*, 392 U.S. 481 (1968).

ARGUMENT

I. *ASSOCIATED GENERAL CONTRACTORS* DOES NOT MODIFY *ILLINOIS BRICK*.

Illinois Brick and *Hanover Shoe*, taken together, establish the strong and complementary principles that direct purchasers have the right to recover for antitrust overcharges, and that neither defendants nor so-called "indirect" purchasers will be heard to assert that these overcharges were passed on. Thus, pass on arguments cannot be employed either as a sword by antitrust plaintiffs or as a shield by antitrust defendants. This policy judgment is based on the need to avoid possibly insurmountable "evidentiary complexities and uncertainties," to eliminate the risk that defendants would suffer multiple liability, and to ensure effective enforcement of antitrust laws. *Illinois Brick*, 431 U.S. at 730-33, 745-46. Not surprisingly, the exceptions to this direct purchaser rule are limited and narrow. *See Kansas* v. *Utilicorp United Inc.*, 497 U.S. 199, 216-17 (1990).[4] In this case this Court refused to carve out exceptions to *Illinois Brick* for particular markets, explaining that "[h]aving stated the rule in *Hanover Shoe*, and adhered to it in *Illinois Brick*, we stand by our interpretation. . . ." *Utilicorp United*, 497 U.S. at 217.

Despite the Supreme Court's express pronouncements on the scope and contours of the *Illinois Brick* rule, the court below adopted a balancing test that would permit plaintiffs in this case to recover antitrust damages based

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[4] The Supreme Court has identified two possible exceptions to the direct purchaser rule. The first occurs where an overcharged buyer was a party to a "cost-plus" contract, which effectively ensured that the direct purchaser could pass on the entire overcharge without fear of a decrease in its own sales. *See Hanover Shoe*, 392 U.S. at 494; *Illinois Brick*, 431 U.S. at 736. The second exception occurs "where the direct purchaser is owned or controlled by" the indirect purchaser. *Illinois Brick*, 431 U.S. at 736 n.16. Neither exception is at issue in the present case.

upon a pass on argument.[5] To support its conclusion, the court invoked *Associated General Contractors*, a Supreme Court opinion decided subsequent to *Illinois Brick* but *before* the Court's reaffirmation of *Illinois Brick* in *Utilicorp United*.

Moreover, *Associated General Contractors* is not an indirect purchaser case. There is not one word in that decision that even purports to overrule, modify, or question *Illinois Brick's* prohibition against indirect purchaser antitrust suits.[6]

Illinois Brick and *Associated General Contractors* should be read together as complementary cases. What *Illinois Brick* says is that pass on claims should never be entertained, except in extraordinary situations—for the reasons spelled out in that decision and in *Hanover Shoe*. But there are other remote claimants whose cases do not depend on an overcharge pass on argument, and *Associated General Contractors* establishes groundrules for a standing inquiry in those situations.

In *Associated General Contractors*, the antitrust plaintiffs represented local unions and trade councils. They charged that a multi-employer association and its members coerced third parties to enter into business relations with nonunion firms. Thus, the plaintiffs did not stand in the direct line of distribution allegedly tainted by the unlawful restraints, and did not rely on pass on of over-

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[5] Appendix to Petition for Writ of Certiorari (hereinafter "App.") at 49a-51a.

[6] *Associated General Contractors* does cite to *Illinois Brick* and, in fact, concludes that the policy concerns behind the *Illinois Brick* rule are relevant factors to consider in determining whether any antitrust claimant has antitrust standing. *Associated General Contractors*, 459 U.S. at 544-45. However, contrary to the Third Circuit's apparent assumption, the extension of *Illinois Brick's* policy rationales to another context is not tantamount to a rejection or reformulation of the *Illinois Brick* rule.

charges.[7] *Associated General Contractors* does not modify *Illinois Brick*, it supplements it by identifying antitrust standing considerations in situations where *Illinois Brick* does not apply.

Other courts of appeal have had no trouble understanding that the *Illinois Brick* test continues to apply in situations where the putative plaintiff relies on the claim that an original overcharge has been passed on. *See, e.g., Illinois ex rel. Hartigan* v. *Panhandle Eastern Pipe Line Co.*, 839 F.2d 1206, 1210 (7th Cir.), *cert. denied*, 488 U.S. 986 (1988) ("We read *Illinois Brick* as requiring that in this case, as well as more complex cases, it is only the direct purchasers who may bring a treble damage action."); *Adams* v. *Pan American World Airways, Inc.*, 828 F.2d 24, 28 n.9 (D.C. Cir. 1987) ("Unlike *Illinois Brick*, which flatly precludes indirect purchasers from bringing antitrust actions in virtually all cases, *Associated General* does not go so far as to say that suppliers of an input never have standing to assert a claim for damages resulting from illegal restraints in their purchaser's market."); *Fisher* v. *Wattles*, 639 F. Supp. 7, 8 (M.D. Pa. 1985) (Under *Illinois Brick* and its progeny, "remote purchasers have no cause of action under" the federal antitrust laws "except in two narrowly-defined, exceptional situations.").

In *Merican, Inc.* v. *Caterpillar Tractor Co.*, 713 F.2d 958 (3d Cir. 1983), the court explained that *Illinois Brick* and *Associated General Contractors* offer two separate and independent tests for evaluating antitrust stand-

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[7] The unions' claims rested on the following complex reasoning—as a result of defendants' alleged coercion, certain firms diverted business away from union subcontractors, which in turn had to cut their work forces or reduce hours or compensation for their employees, which in turn forced the out-of-work or lower compensated employees to reduce the amount of dues they paid to the plaintiff unions and trade councils. *Associated General Contractors*, 459 U.S. at 545. Essentially, the union plaintiffs' claims were as attenuated as antitrust claims by mortgagors or creditors of the lower-paid or out-of-work employees would have been.

ing—and affirmed dismissal of an indirect purchaser's suit on *Illinois Brick* grounds, without even determining whether *Associated General Contractors* would lead to the same result. The court below cited *Merican, Inc.* and acknowledged that the case was decided solely "on the operation of the *Illinois Brick* concern." App. at 47a-48a. However, the court concluded that the case before it could not similarly be decided because the facts at issue "require, under [*Associated General Contractors*] a more complete analysis." App. at 48a. The Court did not explain why it was "require[d]" to disregard the landmark case on pass on claims (*Illinois Brick*) and follow a case that did not deal with overcharge pass on claims at all.

The difference between the bright line test of *Illinois Brick* and the balancing test of *Associated General Contractors* is of enormous practical significance. The antitrust litigation process can consume vast public and private resources, regardless of the outcome. Litigation costs can deter potential plaintiffs from the pursuit of meritorious claims and can deter defendants from the pursuit of meritorious defenses. If a complex balancing test is substituted for the *Illinois Brick* rule, what would otherwise be simple direct purchaser actions are likely to be turned into nationwide extravaganzas, in which standing issues cannot be resolved until there has been an extensive and expensive inquiry into the facts. In antitrust litigation, there is merit in *per se* rules of procedure as well as *per se* rules of liability.

II. THE PUBLIC POLICY JUSTIFICATIONS BEHIND THE *ILLINOIS BRICK* DECISION ARE STILL VALID TODAY.

A. The Risk of Duplicative Recoveries

Illinois Brick rests upon important policy grounds that are as valid and compelling today as they were in 1977 when *Illinois Brick* was decided. The Supreme Court

found, for example, that defendants would be exposed to the risk of multiple liabilities if pass on claims were entertained. *Illinois Brick*, 431 U.S. at 730. This risk followed from the absolute barrier against the *defensive* use of pass on arguments erected by the earlier opinion in *Hanover Shoe*. If there were no complementary barrier to the *offensive* use of a pass on argument, there would be:

> the possibility of inconsistent adjudications—and therefore of unwarranted multiple liability for the defendant—by *presuming* that one plaintiff (the direct purchaser) is entitled to full recovery while preventing the defendant from using that presumption against the other plaintiff; overlapping recoveries are certain to result from the two lawsuits unless the indirect purchaser is unable to establish any pass-on whatsoever.

Id. at 730-31. Accordingly, to avoid the risk of duplicative recoveries by plaintiffs and multiple ilabilities for defendants in the federal courts,[8] it is essential to preserve the symmetry between *Illinois Brick* and *Hanover Shoe*.

If *Associated General Contractors* is misinterpreted to permit a pass on offense under certain circumstances, *Hanover Shoe*'s ban on pass on defenses would have to be similarly modified to preserve fairness and symmetry. It is incredible to suppose that *Associated General Contractors* contemplated such a result—especially since this

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[8] It is true that duplicative recoveries are possible in actions under state antitrust laws. This result was sanctioned by this Court's decision in *California* v. *ARC America Corp.*, 490 U.S. 93 (1989), which sustained so-called state "indirect purchaser" statutes against claims of federal pre-emption. But nothing in *ARC America* purports to modify federal policy articulated in *Illinois Brick*. If there is some risk of duplicative recoveries in state law actions, it is even more important for federal courts to avoid standing rules that will *increase* the risk.

Court was not confronted with an overcharge pass on claim or defense in that case. Indeed, in at least one subsequent case, the Supreme Court unequivocally stated that "no indirect purchaser is entitled to sue for damages for a Sharman Act violation . . . ." *ARC America*, 490 U.S. at 100. This express Supreme Court reaffirmation of the *Illinois Brick* rule is at odds with the Third Circuit's claim that the Supreme Court itself somehow modified *Illinois Brick* in *Associated General Contractors*. In addition, as mentioned above, the decision in *Utilicorp United* refutes the Third Circuit's position.

B. The Importance of Manageability

The *Illinois Brick* rule was also mandated by the need to avoid "evidentiary complexities and uncertainties" that necessarily are involved in pass on claims. *Illinois Brick*, 431 U.S. at 732. This policy consideration is just as compelling today as it was in 1977, when *Illinois Brick* was decided. These complexities and uncertainties are of two kinds: one arising out of the multiplicity of claimants and the other arising out of the difficulties in calculation of damages.

Large and complex economies are characterized by lengthy and complicated channels of distribution; it is a mistake to suppose that a modification of *Illinois Brick* would require pass on calculations at only one level. The facts of *Illinois Brick* itself illustrate the point. The case involved a conspiracy by manufacturers to fix the price of masonry brick. Theoretically, direct purchaser brick wholesalers, masonry contractors, general contractors, initial purchasers of brick buildings, subsequent purchasers of the buildings, lessees of the buildings, and even purchasers of goods or services from lessees of the buildings could claim economic injury resulting from a pass on of the initial overcharge. A line has to be drawn somewhere—and, wherever the line is drawn, someone in an-

other layer may be able to construct a plausible claim of damage.[9]

The second complexity arises from the fact that a calculation of damages passed on would be extraordinarily difficult. The estimation of damages suffered by direct purchasers alone is no easy task. There are very few cases where evidence has indicated that price-fixing conspirators met and agreed on a specific price increase that otherwise would not have occurred. In most cases, there will be evidence of words or actions designed to maintain or increase prices generally, and it is necessary to estimate what the "but for" world would have looked like. This typically is done by plotting sales prices in an industry over a period of time, which ideally extends before and after the "conspiracy period." The construction of this "actual" price line itself can be complicated because of elaborate discount structures and adjustments for product specifications. Then, for comparison purposes, a "competitive" price line is extrapolated forward or backward from an untainted period. This is no easy task either because account has to be taken of inflation rates and changes in overall supply and demand conditions at the seller level. Economists have widely differing opinions on these issues.

This is all required to determine damages at the first level. In order to estimate damages that are passed on, it would then be necessary to analyze the "elasticities" of supply and demand at subsequent levels in the distribution chain—"elasticities" being a technical term to describe the extent to which the supply of a product or demand for a product varies with its selling price.[10] This

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[9] This situation can arise in other areas of law. In a personal injury case, for example, injured people can recover in full for the harm—even though a portion of the harm may have actually been suffered by others, like employers or relatives.

[10] For discussion of the economics of pass on, see Cirace, *Apportioning Damages Between Direct and Indirect Purchasers in Con-*

would require a massive inquiry into industry economics at the first purchaser level. (The supply and demand conditions at the purchaser level are, of course, quite different from those that presumably have already been investigated for the supplier level.) These facts would also vary over time with changes in supply and demand conditions.

The task would thus be vastly more complex than the already complex task of estimating direct purchaser damages. The estimated overcharges at the direct purchaser level, derived from actual and reconstructed price lines, would have to be modified by continuously changing adjustments over time—and each one of these adjustments would be the subject of intense economic controversy. This process would have to be repeated again and again for every level in the chain.

In *Illinois Brick*, the Court noted that "it is unrealistic to think that elasticity studies introduced by expert witnesses will resolve the pass-on issue." *Illinois Brick*, 431 U.S. at 742. Nothing has occurred in the field of economics to undercut the validity of this statement or to suggest that the complexity concerns expressed in *Illinois Brick* have in any way abated. Accordingly, the Third Circuit's abandonment of the bright-line *Illinois Brick* rule undermines this Court's concern about the unacceptable levels of complexity that are introduced by pass on claims.

C. Potential Adverse Effects on Enforcement

Finally, the *Hanover Shoe* and *Illinois Brick* opinions expressed concern that the complexities of pass on claims would undermine antitrust enforcement. The Court con-

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solidated Antitrust Suits: ARC America Unravels the Illinois Brick Rule, 35 Vill. L. Rev. 283, 311-17 (1990). This article is here referenced because the analysis of the problem is instructive, but The Business Roundtable does not agree with the author's recommended solutions.

cluded in *Illinois Brick* that indirect purchaser suits would discourage "vigorous private enforcement of the antitrust laws" by reducing the incentive for private parties to bring suit. *Illinois Brick*, 431 U.S. at 745. Litigation of pass on issues would increase the complexity and costs of antitrust suits, "reduce the benefits to each plaintiff by dividing the potential recovery among a much larger group," and interject uncertainty as to how much of an overcharge could be established and how much would be apportioned among the various plaintiffs. *Id.* The Third Circuit's re-formulation of *Illinois Brick*, which permits indirect purchaser suits if a court finds "the facts [so] require" (App. at 48a), may enable a particular plaintiff to recover in a particular case, but in the long run it would frustrate and undermine this Court's goal of promoting antitrust enforcement.

CONCLUSION

This Court barred pass on claims in both *Hanover Shoe* and *Illinois Brick* in order to minimize the risk of duplicative recoveries, to avoid unmanageable litigation, and to promote antitrust enforcement actions. These considerations are as compelling today as they were when those cases were decided. The Third Circuit has misapplied *Associated General Contractors* in a way that would undercut both of these decisions and their compelling policy concerns.

We urge this Court to review the decision below, and reverse.

Respectfully submitted,

Of Counsel
RICHARD REA
Barley Mill Plaza
P.O. Box 80036
Wilmington, DE 19980-0036

* Counsel of Record

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THOMAS B. LEARY *
MICHELE S. HARRINGTON
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